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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOHN V. FRANCKS TURKEY CO., INC., doing business as White Acres Turkey Ranch, Debtor.	BAP No. UT-98-066
FIRST SECURITY BANK, N.A., Appellant, v. JOHN LAVAR FRANCKS; SUE ANN FRANCKS; JOHN V. FRANCKS TURKEY CO., INC.; and DUANE H. GILLMAN, Trustee, Appellees.	Bankr. No. 98-21649 Chapter 12 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before BOHANON, ROBINSON, and CORNISH, Bankruptcy Judges.

ROBINSON, Bankruptcy Judge.

The Court has before it for review an order confirming the Chapter 12 Plan filed by John V. Francks Turkey Co., Inc. (the Debtor). For the reasons set forth below, we affirm the bankruptcy court's decision.

I. Background.

John V. Francks Turkey Co., Inc. (the Debtor), is a Utah corporation doing

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

business as White Acres Turkey Farm. John LaVar Francks and his son, Matthew, own 51% and 49% of the business, respectively. John Francks and his wife, Sue Ann, are debtors in a separate Chapter 12 bankruptcy. The Debtor is a turkey producer under contract with Moroni Feed Company. After deduction for expenses, the Debtor receives an 80% share of the revenue in a cash dividend paid at the end of the production year, and a revolving dividend paid to the producer five years from that date.

The three years preceding the bankruptcy filing were financially difficult for the Debtor. Turkey prices were down and its flock was struck by an outbreak of avian flu. In 1996, the Debtor switched from being a cash grower to a contract grower and reduced its expenses by cutting the work force to John and Matthew Francks. Income was offset by losses in 1997.

The Debtor has three loans with First Security Bank (the Bank): 1) a 7-year Farm Operating Loan with a balance of approximately $430,000.00; 2) a 25-year Farm Ownership Loan, with a balance of approximately $300,000.00; and 3) an annual Revolving Loan with a balance of approximately $380,000.00 (collectively, the Bank Loans). The contractual interest rate on the Bank Loans is prime plus 2%. The Bank Loans are primarily secured by real estate, water stock, and an assignment of the Debtor's dividend account with Moroni Feed Company. The Bank is oversecured.

The Debtor's Chapter 12 Plan (the Plan) provides that the Bank will be paid the full amount of its secured claim at the contract rate of interest over a 25-year term. The Debtor will make an initial payment under the Plan of $224,484.00 toward the balance of the Bank Loans, with annual payments of $111,295.00 thereafter, plus any of the revolving dividends it will receive from Moroni Feed Company over and above such amount in any given year.

The bankruptcy court heard two days of evidence on the confirmation

issues. The Debtor presented the testimony of John, Sue Ann, and Matthew Francks, and David Bailey, president of Moroni Feed Co. The Bank presented testimony of two of its officers. Based on the evidence, the bankruptcy court confirmed the Plan.[1] This appeal followed.

II. Appellate Jurisdiction.

This Court, with the consent of the parties, has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1). Under this standard, we have jurisdiction over this appeal. The parties have consented to this Court's jurisdiction in that they have not opted to have the appeal heard by the United States District Court for the District of Utah. *Id.* at § 158(c); 10th Cir. BAP L.R. 8001-1(a) and (d). The appeal was filed timely by the Debtor, and the bankruptcy court's Order is "final" within the meaning of § 158(a)(1). *See* Fed. R. Bankr. P. 8001-8002.

III. Standard of Review.

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Fed. R. Bankr. P. 8013. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

IV. Discussion.

The Bank raises two issues on appeal: 1) the Debtor's Plan does not provide the Bank with the present value of its claim; and 2) the Plan is not

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[1] The Chapter 12 Plan of John and Sue Ann Francks was also confirmed at that time.

feasible. We will discuss each issue in turn.

A. Present Value.

In order to be "fair and equitable," a Chapter 12 plan must provide that each claimant "receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim . . . as of the effective date of the plan." 11 U.S.C. § 1225(a)(5)(B)(i) and (ii).[2] This entitles a secured creditor to payments equaling the present value of its claim, which requires the debtor to pay interest or a discount factor on such claims.

In determining the appropriate amortization of a secured claim to be paid through deferred cash installments, the threshold issue is determining the length of time over which payments may be made. The Bank argues that the bankruptcy court erred in allowing the Debtor to amortize the Bank Loan payments over 25 years. Chapter 12 generally requires that all payments due under a plan must be made within three years. § 1222(c). An exception to this rule vests the bankruptcy court with discretionary authority to extend repayment when appropriate. § 1222(b)(9). The present value provision in § 1225 does not specifically address the length of the repayment term that must be provided under the plan. As Collier notes, "[t]he maximum period of time must be implied by the court from the present value and good faith requirements of section 1225." 8 *Collier on Bankruptcy* ¶ 1225.03[4][b] at 1225-17 (Lawrence P. King ed., 15th ed. rev. 1999).

Most courts that have addressed the permissibility of stretching out repayments to secured creditors have been lenient in allowing the debtors the maximum time for paying secured creditors. *See Travelers Ins. Co. v. Bullington*, 878 F.2d 354, 356-58 (11th Cir. 1989) (using present value standard court

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[2] Future references are to Title 11 of the United States Code, unless noted otherwise.

approved plan's repayment of secured claim over 30 years, where in the original note it was payable over 4 years); *In re Mulberry Agric. Enters., Inc.*, 113 B.R. 30, 32-33 (D. Kan. 1990) (allowing a Chapter 11 plan to extend real estate contract for a period of 30 years); *In re Snider Farms, Inc.*. 83 B.R. 977, 999 (Bankr. N.D. Ind. 1988).

We find no abuse of discretion in this case. The Bank's witnesses testified as to the specific terms of the Bank Loans; the Bank did not present any evidence as to the market standards or customary industry treatment of the length of agricultural loans. In this case, the Debtor is consolidating its three Bank Loans, to be paid over the maximum 25-year term. The Bank Loans are secured by real estate, and in fact, the Bank is oversecured. The Bank failed to demonstrate any compelling reason why the Debtor should not be able to reamortize its consolidated debts with a 25-year loan, and we will not reverse on this ground.

Once the repayment term has been established, it is necessary for the court to apply a discount factor to the proposed stream of payments to determine the present value of those payments. *Hardzog v. Federal Land Bank(In re Hardzog)*, 901 F.2d 858 (10th Cir. 1990), binds this Court to determine a "market" rate of interest, that being the current market rate of interest for "similar loans" in the region. *Id.* at 860. The Tenth Circuit held that, "in the absence of special circumstances, such as the market rate being higher than the contract rate, Bankruptcy Courts should use the current market rate of interest used for similar loans in the region." *Id.* (footnote omitted). Bankruptcy courts have interpreted *Hardzog* to mean that the contract rate should be used if it is lower than the market rate, and that the contract rate "serves as a sort of ceiling for the capitalization rate in a cram down situation." *In re Oglesby*, 221 B.R. 515, 520 n.5 (Bankr. D. Colo. 1998); *see In re Segura*, 218 B.R. 166, 173 (Bankr. N.D. Okla. 1998) ("The Tenth Circuit, therefore, capped the cramdown interest rate at

the contract rate.").

In this case, the Debtor proposed to pay the Bank its contract rate of interest of prime plus 2%. The Bank objected, presenting testimony that its market rate for similar loans would be prime plus 2 or 3%. The bankruptcy court confirmed the Plan at the contract rate of interest. The Bank argues that the court's decision was clearly erroneous and that the Debtor did not meet its burden of proof with respect to the present value requirement. We disagree.

The Debtor, as the Plan proponent, bears the initial burden of proof with respect to confirmation of its Plan. *See In re Maras*, 226 B.R. 696, 701 (Bankr. N.D. Okla. 1998). With respect to present value, however, the creditor objecting to the proposed interest rate has the burden of proving the breadth of its current rates and the criteria under which loans are made at such rates, and must establish why the debtor would fall within such rate criteria. *Segura*, 218 B.R. at 176. The debtor then has the burden of establishing any "special circumstances" envisioned but not defined by *Hardzog*. *Id.* Ideally, each party would submit evidence on current market rates of interest. In this case, however, the Debtor's Plan proposed to pay the contract interest rate. The Bank's testimony indicated its market rate for such loans was higher than the contract rate by one percentage point. Accordingly, the bankruptcy court correctly held that the contract rate of interest was appropriate, pursuant to *Hardzog's* directive.

B. Feasibility.

The Bank argues that the Debtor failed to meet its burden of proof as to feasibility of its Plan. Specifically, the Bank argues that the Debtor's projections were not based on past performance and that John Francks, who is 62 years old, will not live to see the end of the Plan.

The feasibility test as stated in § 1225(a)(6) provides that a Chapter 12 plan shall be confirmed if "the debtor will be able to make all payments under the

plan and to comply with the plan." Feasibility is a question of fact that necessarily entails a determination of the comparative credibility of experts as well as of the debtor. *In re Crowley*, 85 B.R. 76, 78-79 (W.D. Wis. 1988). Many courts have held that a Chapter 12 debtor should be given the benefit of the doubt regarding the issue of feasibility when the debtor's plan projections--using reasonable inputs in light of the current economic climate--indicates that it is reasonably probable that the debtor can satisfy the plan payments. *See First Nat'l Bank v. Hopwood (In re Hopwood)*, 124 B.R. 82, 86 (E.D. Mo. 1991); *Farmers Home Admin. v. Rape (In re Rape)*, 104 B.R. 741, 748 (W.D.N.C. 1989). Thus, it is not necessary that the debtor guarantee to the court that the plan will be successful, but only provide reasonable assurance that the plan can be achieved. *Hopwood*, 124 B.R. at 86. However, the court must be persuaded that it is probable that a plan will be able to generate adequate cash flow based upon realistic and objective facts. *In re Honeyman*, 201 B.R. 533, 537 (Bankr. D.N.D.1996).

The Debtor bears the burden of proof as to the feasibility of its Plan. *In re Rape*, 104 B.R. at 748. The Debtor primarily supported its bid for confirmation with the testimony of David Bailey, who testified that the primary factor precipitating the reduction in production during the three years prior to filing was the 1995 outbreak of avian influenza, an unprecedented event. Bailey further testified that 1996 and 1997 were difficult years for the turkey industry. He testified that the previous five-year history of the Debtor established that it averaged dividends of ten cents per pound per year and that it was reasonable to base its Plan projections on that amount. Matthew Francks further testified that he had been a full-time turkey producer with the Debtor for 13 years and intended to continue to farm and comply with the terms of the Plan for its full term.

In support of its objection to confirmation, the Bank offered testimony of

William Freed, its vice president in the credit services department. Freed prepared the Bank's feasibility study for the Debtor, which, upon examination, revealed several inaccuracies in the Debtor's favor.

The bankruptcy court found all of the testimony regarding feasibility was credible and had a rational basis. The court noted that some of the expense factors considered by Freed might not have been justified and that his analysis was based on years in which the Debtor operated on a cash basis, rather than the contract basis under which it currently operates. The court further noted that in recent years the Debtor had "not done terribly well." The court concluded that the Debtor had met its burden regarding feasibility.

We find the bankruptcy court's decision to be supported by the evidence. The Debtor's cash flow projections were based upon realistic and objective facts. The disastrous three years prior to bankruptcy appear to be the exception, and income projections were based on historical performance averages. John Francks's age should not be determinative of the success of the Plan, given his son's stake in the outcome and intention to continue when his father is unable to do so. Accordingly, the court's finding that the Plan was feasible was not clearly erroneous, and we will not reverse on this ground.

V. Conclusion.

For the reasons set forth above, the decision of the bankruptcy court confirming the Debtor's Chapter 12 Plan is AFFIRMED.